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No. 99-929

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,
Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AND LEAGUE OF WOMEN VOTERS OF MISSOURI IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE MISSOURI PROVISION IS AN UNCONSTITUTIONAL USE OF STATE POWER TO AFFECT THE OUTCOMES OF ELECTIONS TO CONGRESS. 4

A. A State's Authority To Prescribe the "Times, Places and Manner" of Federal Elections May Not Be Used To Favor Some Candidates or Policy Positions Over Others. 5

B. The Missouri Provision Is an Attempt To Use the State-Controlled Mechanics of Federal Elections in a Nonneutral Manner To Bring About the Election of Members of Congress Who Favor a Specific State Policy. 9

II. HISTORY DOES NOT SUPPORT THE CONSTITUTIONALITY OF THE MISSOURI PROVISION. 16

A. Petitioner's and Her *Amici*'s Historical Examples Do Not Speak to the Constitutionality of the Missouri Provision Because None Involved Placing a Message Setting Forth State Policy on a Federal Election Ballot. 16

TABLE OF CONTENTS — Continued

Page

B. Petitioner and Her *Amici* Ignore the Consistent Opposition to Instructing Representatives and Misconstrue the Framers' Rejection of a Constitutional Right To Instruct 22

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Advisory Opinion to the Attorney General re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998) 11
AFL-CIO v. March Fong Eu, 686 P.2d 609 (Cal. 1984) 17
Anderson v. Celebrezze, 460 U.S. 780 (1983) 8, 10
Anderson v. Martin, 375 U.S. 399 (1964) 9, 14
Barker v. Hazeltine, 3 F. Supp. 2d 1088 (D.S.D. 1998) 11
Burdick v. Takushi, 504 U.S. 428 (1992) 7, 10
Burson v. Freeman, 504 U.S. 191 (1992) 7, 14
California Democratic Party v. Jones, 120 S. Ct. 2402 (2000) 5, 7
City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976) 5, 15
Clements v. Fashing, 457 U.S. 957 (1982) 8
Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996) 10
FERC v. Mississippi, 456 U.S. 742 (1982) 19
Foster v. Love, 522 U.S. 67 (1997) 6
Georges v. Carney, 691 F.2d 297 (7th Cir. 1982) 14
Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999) 11
Graves v. McElderry, 946 F. Supp. 1569 (W.D. Okla. 1996) 14
Hunter v. Erickson, 393 U.S. 385 (1969) 5, 15
In re Opinion of the Justices, 148 So. 107 (Ala. 1933) 20
League of Women Voters v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997) 2, 11
Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) 5, 15
Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999) 11
Powell v. McCormack, 395 U.S. 486 (1969) 8
Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992) 14
Smiley v. Holm, 285 U.S. 355 (1932) 6

TABLE OF AUTHORITIES — Continued

Page

State ex rel. Harper v. Waltermire, 691 P.2d 826 (Mont. 1984) 17
State ex rel. McCue v. Blaisdell, 118 N.W. 141 (N.D. 1908) 21
Tashjian v. Republican Party, 479 U.S. 208 (1986) 8, 15
Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996) 2
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 14
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) ..... *passim*
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 4, cl. 1 ..... 1, 2, 4, 5

STATUTORY PROVISIONS

Idaho Session Law, House Bill No. 16, § 41 (1909) 21
Mo. Const. art. VIII, §§ 15-22 ..... 2, 10, 12
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1909 Neb. Laws ch. 51, § 2 21

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TABLE OF AUTHORITIES — Continued

Page

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Articles of Confederation, art. V 19
The Federalist No. 10 23
The Federalist No. 71 23
Official Manual, State of Missouri 1997-1998 (Jim Grebing ed.) 11

BRIEF OF *AMICI CURIAE*

Amici respectfully submit this brief to make two points. First, the power of the States to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, does not include the power to disfavor a particular candidate for federal office by placing a notation on the ballot criticizing the candidate for failure to endorse or obey the State's substantive views on a federal issue. Second, the history of constituent instructions in this country provides no support for the constitutionality of such substantive intrusion by States into federal elections.

INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in more than one thousand communities and in every state, with more than 125,000 members and supporters nationwide. One of its independent state Leagues is *amicus curiae* League of Women Voters of Missouri. The League of Women Voters of the United States and the League of Women Voters of Missouri (jointly, the "League") were organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States.

One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive; that protects individual liberties established by the Constitution; and that assures opportunities for citizen participation in government decisionmaking. To further this goal, the League has participated as a party or *amicus* in this

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[1] This brief was authored in its entirety by undersigned counsel for *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

Court and other courts, addressing campaign finance, term limits, and other issues relating to the electoral process.

The League has a strong interest in this case. The League opposes term limits because they violate the most fundamental of all rights in a democracy — the right of citizens to vote for the governmental representatives of their choice. The Missouri constitutional provision at issue here, however, not only infringes on this right, but also is at war with the core values that the League has protected and promoted for the last eighty years. If upheld, the law would corrupt the electoral process itself. It would allow the State to use its power under the Elections Clause to manipulate the machinery of congressional elections to inject its own views on substantive federal issues into the electoral process at the most critical moment and in the most crucial space — on the ballot.

Amici submit this brief to explain the threat that Missouri's unconstitutional action presents to the integrity of the federal electoral process.[2]

SUMMARY OF ARGUMENT

The Constitution assigns responsibility for conducting the elections of United States Senators and Representatives to the States, and it directs them to prescribe the "Times, Places and Manner" of these elections through neutral, even-handed regulations. U.S. Const. art. I, § 4, cl. 1. Invoking this authority, the State of Missouri has adopted a ballot-branding mechanism, Mo. Const. art. VIII, §§ 15-22 (hereinafter, "Missouri Provision" or "Provision"), that is anything but neutral. Under the Missouri Provision, a partisan official of

[2] One of the state Leagues has successfully challenged a nearly identical law in another state. *See League of Women Voters v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997). Moreover, the Arkansas League was a winning party in the leading term limits case, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); the League of Women Voters of Washington was a victorious party in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996), one of the predecessors to *Thornton*; and the LWVUS filed an amicus brief in *Thornton*.

the State audits candidates for United States Congress for their obedience (or pledged obedience) to the State's official policy on federal term limits, then labels candidates who have not supported the State's policy on the ballot as having "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." *Id.* §§ 17, 18. Although these ballot labels are framed as if they are conveying the current sentiments of the electorate, the Missouri Provision in fact tests candidates against a particular term limits policy enshrined in state law back in 1996, and it makes no effort to ascertain or accurately reflect the current wishes of a federal candidate's constituents. Candidates are given no opportunity on the ballot to respond to or explain these highly misleading labels; indeed, under Missouri law, they are not even permitted within twenty-five feet of the polling place.

The Constitution does not permit the State of Missouri to abandon its impartiality and participate in congressional elections as an interested advocate. A State's delegated authority to regulate the "Times, Places and Manner" of such elections — a phrase that has always referred to substantively neutral *procedural* regulations — does not include the power to manipulate the electoral mechanism so as to encourage the national government representatives elected from that State to embrace the State's view of proper federal policy. Missouri's suggestion that the Provision is merely a voter education mechanism is belied by the fact that the Provision does not even attempt to convey an accurate message about the candidates' adherence to the current sentiments of their constituents, let alone do so in fact.

Petitioner and her *amici* argue that the Missouri Provision is constitutional because it is merely a modern-day version of the historical practice of constituent instructions to legislators. This argument fails both because the Missouri Provision differs in significant respects from the historical examples Petitioner and her *amici* cite, and because the history of instructions shows that the practice has always been

sharply criticized, including, for example, by the Framers, who rejected placing a right to instruct in the First Amendment. Because none of the historical examples involved federal elections, they have no bearing on the meaning of the Elections Clause. In addition, most of the historical examples relied solely on the informal expectation that officeholders would follow constituent sentiment; the Missouri Provision, by contrast, involves direct state intrusion into the relationship the Constitution creates and protects between federal representatives and their constituents.

ARGUMENT

I. THE MISSOURI PROVISION IS AN UNCONSTITUTIONAL USE OF STATE POWER TO AFFECT THE OUTCOMES OF ELECTIONS TO CONGRESS.

The Constitution's Elections Clause assigns the States the responsibility of establishing the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. The State of Missouri claims no other constitutional source of power to impose ballot labels on candidates for Congress, (Pet. Br. 28, 38), and there can be no other. But the Elections Clause grants the power to establish neutral procedural regulations for federal elections, not the power to audit the candidates and place substantive (and, in this instance, highly misleading) comments on the ballot about their adherence to official state policies on matters of federal law.

Under the Missouri Provision, the State ceases to be a neutral referee of federal elections and becomes an advocate for those candidates who favor the State's official view of proper federal policy in a particular area (in this instance, constitutional limits on terms of service in Congress). A partisan state official audits candidates' public statements and voting records, then places on the ballot itself an expression of the State's disagreement with any candidate who has not supported the position adopted by the State in 1996 on that

issue. While the ballot labels Missouri imposes suggest that the branded candidates are ignoring the wishes of the "VOTERS," the Missouri Provision has little or nothing to do with the actual current sentiments of a candidate's constituents. Missouri is testing candidates against a State policy established in 1996 and branding those who have not supported the State's position. The Constitution does not permit the States to police candidates for the United States Congress in this fashion.[3]

A. A State's Authority To Prescribe the "Times, Places and Manner" of Federal Elections May Not Be Used To Favor Some Candidates or Policy Positions Over Others.

The Elections Clause, U.S. Const. art. I, § 4, cl. 1, directs state legislatures to adopt "Regulations" prescribing the "Times, Places and Manner" of elections to Congress. This power is subject (with an irrelevant exception) to the power of Congress to "make or alter such Regulations." *Id.* This Court has made clear that the only powers States have with respect to elections of Members of Congress are those delegated by this Clause, *see U.S. Term Limits, Inc. v. Thornton*,

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[3] The Missouri Provision was adopted by popular referendum rather than by the State Legislature. This makes no constitutional difference: the issue is whether a State can establish — by whatever method of passing legislation — an official viewpoint with respect to some federal issue, then use the electoral mechanism to brand candidates for Congress who do not support and obey the State's favored position. On this point, an action taken by referendum is no more valid than the same action if taken by the State Legislature. *See City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736-37 (1964).

Action by referendum does, however, pose a technical problem in this instance. The Elections Clause says regulations may be adopted by "each State *by the Legislature thereof*." U.S. Const. art. I, § 4, cl. 1 (emphasis added). It is unclear whether States may adopt regulations governing federal elections by means other than actions of their legislatures. *See California Democratic Party v. Jones*, 120 S. Ct. 2402, 2422-23 (2000) (Stevens, J., dissenting).

514 U.S. 779, 804-05 (1995), and Missouri claims no other constitutional source of power here.[4]

This Court has made clear that the States' power under the Elections Clause is to prescribe neutral regulations governing the "mechanics" of federal elections. *Foster v. Love*, 522 U.S. 67, 69 (1997). The Clause is not a license to the States to use the mechanics of federal elections to promote or oppose federal policies favored or disfavored by the State.

First, the very terms "Times, Places and Manner" suggest that the Framers expected the States to carry out elections to federal office as impartial rule makers and neutral referees, not as partisans with their own interest in the outcome. The Court has itself always used those words to refer to substantive neutrality; indeed, it borrowed the phrase to describe content-neutral regulation of speech.[5] As the Court has said, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes [or] to favor or disfavor a class of candidates." *Thornton*, 514 U.S. at 833-34. *See also Smiley v. Holm*, 285 U.S. 355, 366 (1932) (Elections Clause grants States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental [voting] right involved.").

In addition, the role given to *Congress* under the Elections Clause strongly reinforces the conclusion that "Times, Places and Manner" regulations must be substantively neu-

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[4] The State's claimed power could not be "reserved" to the States by the Tenth Amendment: the power to regulate elections to Congress did not exist until the Federal Government was created by the Constitution. The Constitution delegated regulatory power over congressional elections *to* the States, subject to the power of Congress to "make or alter" state regulations. *See Thornton*, 514 U.S. at 804.

[5] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (describing "time, place, or manner" regulation of expressive activity as "justified without reference to the content of the regulated speech") (internal quotation marks and citation omitted).

tral. The words "Times, Places and Manner" must mean the same thing as to both Congress and the States. If Congress could use its power to "make . . . such Regulations" to inject substantive matters into the election machinery, then instead of following the policies that voters want on term limits (or gun control, or farm subsidies, or any other issue), Congress could manipulate congressional elections to produce future representatives who favor a given position on these issues; by analogy to what Missouri has done here, it could simply adopt a "Regulation" branding the candidates opposed to that position on the ballot. Even if it were possible to imagine the Framers giving the States the power to inject their substantive positions into congressional elections, it is inconceivable that they meant to allow Congress itself to do so. *See Thornton*, 514 U.S. at 832 (finding it "unfathomable" that the Framers would have permitted Congress to set its own qualifications, as that "would inevitably lead to congressional self-aggrandizement"); *California Democratic Party*, 120 S. Ct. at 2416 (Kennedy, J., concurring) ("In a free society the State is directed by political doctrine, not the other way around.").

More generally, in principle, the obligation to conduct an election in a democracy inherently includes the obligation to conduct it impartially. The Court has made clear in numerous contexts — state and federal races, general elections and primaries — that all State regulation of the electoral process must be "nondiscriminatory," "generally applicable," and "evenhanded," *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983), as well as "politically neutral." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). The State's role in an election is to "protect the integrity and reliability of the electoral process," not to skew it, and to "protect[] voters from . . . undue influence," not to persuade them. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion). The State may not jigger the electoral process to "produc[e] elected officials who," in its view, "better represent the electorate" or "stand closer to the median policy positions of their districts," *see California Democratic Party v. Jones*, 120 S. Ct. at 2412,

and it seems equally clear that the State cannot jigger the process to produce officials who better represent the State's own views. *See Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986) (invalidating closed primary statute designed to "ensur[e] that voters are not misled by a 'Republican' candidate who professes something other than what the State regards as true Republican principles"). "[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a certain viewpoint," or that "unfairly or unnecessarily burdens 'the availability of political opportunity'" for proponents of the singled-out position. *Anderson v. Celebrezze*, 460 U.S. at 793 (citations omitted). *See also Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality opinion) (upholding resign-to-run rules that "in no way depend upon political affiliation or political viewpoint"); *id.* at 973 (Stevens, J., concurring) (regulations must be "even-handed"; upholding rule where "there is no suggestion . . . that the State's classification . . . operates to promote a certain viewpoint at the expense of another").[6]

Finally, the State's obligation of strict neutrality in elections to Congress reflects the "fundamental principle" that "'the people should choose whom they please to govern them'" in the Congress of the United States. *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting 2 *Debates on the Federal Constitution* 257 (Jonathan Elliot ed., 2d ed., 1836 (1941) (hereinafter "Elliot's Debates") (Alexander Hamilton)). "The people are the best judges of who ought to represent them" in the national government, and "'to tell them whom they shall not elect, is to abridge their natural rights.'" *Id.* at 541 (quoting 2 Elliot's Debates 292-93

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[6] The dissenters in *Thornton*, although they argued that States may prescribe additional qualifications for Members of Congress, clearly rejected any idea "that States have unbridled power to handicap particular classes of candidates" and agreed that any new qualifications added would be subject to scrutiny under the First and Fourteenth Amendments. *Thornton*, 514 U.S. at 925 (Thomas, J., dissenting); *see also id.* at 870.

(Robert Livingston)). The Court has recently affirmed "that the right to choose representatives belongs not to the States, but to the people," *Thornton*, 514 U.S. at 820-21, and state efforts to disfavor candidates for Congress who disagree with, or fail to obey, state policy would threaten to "sever the direct link that the Framers found so critical between the National Government and the people of the United States." *Id.* at 822. *See also id.* at 842 (Kennedy, J., concurring) ("Nothing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives."). The State may not decide as a State that it prefers its residents' representatives in the United States Congress to hold a certain set of views, then enforce that preference by branding any disobedient candidate with a negative notation on the ballot the State makes available pursuant to the Elections Clause.

B. The Missouri Provision Is an Attempt To Use the State-Controlled Mechanics of Federal Elections in a Non-neutral Manner To Bring About the Election of Members of Congress Who Favor a Specific State Policy.

Contrary to the Petitioner's argument in this Court, the Missouri Provision is *not* a means of conveying voter sentiments to candidates for Congress, or of reporting candidates' views and actions to voters. The Missouri Provision brands candidates, on the ballot, for not following a state policy adopted back in 1996 and made a permanent part of the State's law. The application of the State's brand does not depend on the sentiments of any set of actual voters in any election after 1996. Far from providing any opportunity for real communication between candidates and voters, the Missouri Provision is a blunt instrument applied "at the most crucial stage in the electoral process — the instant before the vote is cast," *Anderson v. Martin*, 375 U.S. 399, 402 (1964), to punish any candidate who does not pledge to follow, and

then actually follow, the State's policy in every detail. The State of Missouri has simply decided *as a State* that it would prefer its residents' representatives in Congress to hold certain views and act in a certain way, and has used its delegated authority over the conduct of federal elections to punish candidates who do not obey.

With the Missouri Provision, the State has stepped out of its constitutional role as neutral election referee and has become a partisan in each congressional election. It has adopted a statute setting forth a determination that it wants every person elected to Congress from Missouri to support and advance a very specific amendment to the United States Constitution, and it has prescribed the particular legislative actions such persons must take, as a matter of state law, in every parliamentary situation the State could think of. The State has further announced that it will enforce these directives through the electoral process itself: an official of the State (herself chosen in a partisan election) will audit candidates' fidelity to the State's policy and instructions, and if that official finds that a candidate has *not* complied (or pledged to comply) with the State's instructions, a message from the State of Missouri will appear next to the candidate's name on the official election ballot, accusing her of "DISREGARD[ING]" her constituents' preferences or "DECLIN[ING] TO PLEDGE" to carry out their wishes. Mo. Const. art. VIII, §§ 17, 18.

The Missouri Provision is, to say the least, not "even-handed," *Anderson v. Celebrezze*, 460 U.S. at 788 n.9, or "politically neutral." *Burdick v. Takushi*, 504 U.S. at 438. As virtually every court to consider one of these ballot branding laws has ruled, the brand is nothing less than "an officially sanctioned recommendation by the State . . . not to vote for such candidates because they disregarded the instructions and wishes of their voters." *Donovan v. Priest*, 931 S.W.2d

119, 128 (Ark. 1996).[7] The State responds by suggesting that its label may not actually convince any voters to change their votes (*see* Pet. Br. at 21), but this misses the point: regardless of the practical impact of the State of Missouri's official message, it is clear that the State is violating its duty to conduct federal elections impartially and is entering these campaigns as an advocate with an obvious point of view.

The State argues that the Provision is an effort by "the people[]" of Missouri "to inform each other regarding their congressional delegation's compliance" with their wishes. (Pet. Br. 7.) But the only "people of Missouri" who took any action at all were the 32% of the electorate who, in 1996, voted in favor of the Provision.[8] The label "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS," applied in 2000 (or 2020) to every disobedient Member of Congress, will commonly be very misleading and often entirely false:

Constituents. In 1996, a majority of the voters in a particular congressional district may *not* have voted in favor of the Provision. (As Petitioner acknowledges, voters in 28 Missouri counties did *not* favor the Provision. (*See* Pet. Br. 21.)) A candidate for Congress who fails to obey Missouri's

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[7] *See also Gralike v. Cook*, 191 F.3d 911, 918-19 (8th Cir. 1999) ("Thus, the labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits or take all action that § 17 requires."); *Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999) ("[the] ballot labels effectively place the state's official stamp of disapproval on . . . candidates . . . whom the state disfavors because of their views on a single political issue"); *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 61 (D. Me. 1997); *Advisory Op. to the Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 n.3 (Fla. 1998) (label is "obviously intended to be, and would be, a negative comment on the candidate at issue").

[8] The Missouri Provision received 1,075,215 votes in its favor in the November 1996 election. There were 3,342,849 registered voters in Missouri at that time. *See Official Manual, State of Missouri, 1997-1998*, at 547, 591 (Jim Grebing ed.).

term limits instructions therefore may be following the wishes of a majority of the voters in her district. But the ballot will *not* say she OBEYED THE WISHES OF VOTERS IN HER DISTRICT. The Secretary of State will brand her as having "DISREGARDED VOTERS' INSTRUCTIONS," and she will have no equivalent opportunity to respond that she is in fact doing what her own constituents favored.

Passage of time. The Missouri Provision became part of Missouri law in 1996. It will continue to brand disobedient candidates in subsequent elections forever, until the precise term limits proposal called for becomes part of the United States Constitution. But there is no reason to assume that voter sentiments will remain unchanged. *See, e.g.*, Matthew Vita, *Political Appeal of Term Limits Appears to Wane*, Wash. Post, July 17, 2000, at A1. Even the State concedes that "[t]he voters in subsequent years may have a different view." (Pet. Br. 21.) This mismatch, too, illustrates that the Missouri Provision is not intended to convey any accurate message to voters as to where candidates stand, but rather to skew elections against candidates who do not follow the State's policy on a federal term limits amendment.

Alternative term limits proposals. The Missouri Provision directs Members of Congress to vote for a specific term limits proposal and *against* all competing proposals, including proposals that would allow longer, but still limited, terms. Mo. Const. art. VIII, § 17. It is the product of a struggle within the term limits movement over shorter versus longer terms, each anathema to supporters of the other.[9] But

[9] At the time the Missouri Provision was adopted, there was an active debate within the term limits movement as to the appropriate limits for incumbents to serve. Many proponents of term limits did (and still do) support longer limits than those contained in the Missouri Provision. *See, e.g.*, David Hess, *Gingrich Pledges To Fight Term Limits of Less Than 12 Years*, Phila. Inquirer, Jan. 12, 1995, at A9; Matthew Vita, *Political Appeal of Term Limits Appears to Wane*, Wash. Post, July 17, 2000, at A5 (chart showing the different term limits proposals that have been adopted in the various states).

there is no reason to assume that all Missouri VOTERS who favored the particular proposal set forth in the 1996 referendum would have opposed, and wanted their Member of Congress to vote against, competing term limits proposals: the referendum did not give VOTERS alternative choices. Nevertheless, a Member who fails to vote against a measure that Missouri voters might well in fact have favored is also branded as having "DISREGARDED VOTERS' INSTRUCTIONS."[10]

Term limits measures attached to larger bills. A Member of Congress may vote against a bill that contains the Missouri-prescribed term limits measure but also contains other provisions that the Member's constituents oppose. She will be branded as having "DISREGARDED VOTERS' INSTRUCTIONS" with no opportunity to rebut the ballot label with an explanation of the offsetting considerations.

In sum, when the Missouri Secretary of State tells a candidate's constituents that the candidate has "DISREGARDED VOTERS' INSTRUCTIONS," the VOTERS in question are not the voters in her own district; they may have changed their minds in the lengthening years since 1996; they may have equally favored a different term limits measure that the candidate got branded for not rejecting; and they might in fact agree with the candidate in rejecting a term limits measure coupled with unacceptable other provisions. But the point is not merely that the ballot brand is highly misleading. The Missouri Provision is simply not a serious effort to convey current voter sentiments to candidates, or to disclose candidate performance to voters. It is an attempt to impose a policy adopted by the State in 1996 by using the State's control over the contents of the ballot to skew elections against candidates who do not follow that policy to the letter.

[10] Similarly, a candidate who declares her support for a competing term limits proposal will still be branded as having "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

It is particularly offensive that the State has chosen to impose its 1996 policy choice by placing its message in the most sacred of secular places: on the ballot. As this Court recognized in *Anderson v. Martin*, 375 U.S. 399 (1964), messages from the State on the official election ballot carry a disproportionate weight precisely because they bring the apparent "power of the State" to bear at "the most crucial stage in the electoral process — the instant before the vote is cast." *Id.* at 402. By branding candidates on the ballots used to elect them, the State of Missouri "direct[s] the citizen's attention to the single consideration of" a candidate's position on the State's favored issue, and signals that the candidate's position should be "an important — perhaps paramount — consideration in the citizen's choice." *Id.*[11]

The Court has also held that the moment when the voter casts his ballot is sufficiently sensitive that it may be "necessary" for a State to ban all electioneering around the polling place to protect the voter from "undue influence." *Burson v. Freeman*, 504 U.S. at 199, 206. For this very reason, in fact, the State of Missouri has made it unlawful to conduct any campaign activities in a polling place or within twenty-five feet of the outside door. *See* Mo. Rev. Stat. § 115.637(18).[12]

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[11] For this reason, several federal courts have ruled that government entities may not manipulate the content of ballots (or even the arrangement of information on a ballot) to favor one candidate or position over another. *See, e.g., Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992) (invalidating statute that permitted party candidates to use party labels on the ballot, but barred non-party candidates from labeling themselves "Independents"); *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (upholding statute that neutrally prevented any advisory referenda from appearing on ballot; "case would be different" if government entity could get its own referenda on the ballot, particularly if entity "was taking sides" on matters of public debate); *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996) (invalidating State's practice of always placing Democratic candidates at top of ballot).

[12] Moreover, even if the State of Missouri did permit candidates to speak at polling places, they would still have no right of access to the ballot itself in order to answer or explain the State's disparaging brand. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

A particular irony of this case is that, while the State of Missouri has deemed the moment of voting so sacrosanct (and the risk of undue influence so great) that the *candidate* cannot be within twenty-five feet of the building, the *State* may approach the voter *in the voting booth itself* and tell her how to cast her vote.

Finally, the fact that the Missouri Provision was itself adopted by public referendum does not render it constitutional. (*Cf.* Pet. Br. 6-7.) A State cannot do by referendum what it could not do through its legislature. "The sovereignty of the people itself is subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). *See also City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736-37 (1964). And the method by which the Provision became a part of state law does not alter its legal force or its requirement that elected State officials audit candidates in federal elections and pronounce judgment on them to the voters in the name of the State itself.[13] *See Thornton*, 514 U.S. at 822 n.32 (invalidating term limits amendment to Arkansas Constitution adopted by referendum and holding method of adoption to be irrelevant). The State cannot step out of its constitutional role as the impartial arbiter of federal elections,

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[13] It is this aspect of auditing and pronouncing judgment on candidates, as well as the intended normative content of the labels, that distinguishes the Missouri Provision's brand from the political party labels cited by the Petitioner and the incumbency labels cited by her *amici*. (*See* Pet. Br. 21-22; Mo. Term Limits Br. 24-28.) Petitioner is correct that party labels may be taken by voters as revealing something substantive about a candidate, but the candidate herself determines with which political party she will affiliate, and (as this Court has held) the State may not audit her campaign platform to make sure that she in fact stands for the principles that the State believes a candidate with that party label should uphold. *See Tashjian v. Republican Party*, 479 U.S. at 220. Similarly, incumbency labels carry no intentional message from the State (let alone a message about the State's favored view on any particular policy issue), and they are applied neutrally.

whether the drive for abandoning neutrality comes from the legislature or a public referendum.

II. HISTORY DOES NOT SUPPORT THE CONSTITUTIONALITY OF THE MISSOURI PROVISION.

Petitioner and her *amici* seek to defend the constitutionality of the Missouri Provision with historical examples of instructions issued to officeholders. The defense fails for two reasons. *First*, all of the examples differ in critical respects from the Missouri Provision. None of these examples involved federal elections or the State's powers under the Elections Clause. None involved a state brand on the ballot designed to discourage voting for candidates for federal office who disobey a state policy. Most were simply expressions of voter views backed only by the threat that voters would turn away from a candidate who disagreed. *Second*, Petitioner's and her *amici*'s portrait of the practice of instructions is very misleading. Instructions were never a generally accepted political practice. On the contrary, the Framers expressly rejected adding a "right to instruct" national representatives to the First Amendment. Having observed the adverse consequences of binding instructions under the Articles of Confederation and in pre-1789 state legislatures, the Framers sought to avoid the strangling of legislative deliberation and the predominance of local over general interests that they believed instructions breed.

A. Petitioner's and Her *Amici*'s Historical Examples Do Not Speak to the Constitutionality of the Missouri Provision Because None Involved Placing a Message Setting Forth State Policy on a Federal Election Ballot.

The historical examples proffered by Petitioner and her *amici* lack the features that render the Missouri Provision unconstitutional. None of the historical examples involved a State placing a brand on a federal election ballot as a means to influence the election of federal legislators who favor a

particular state policy. In fact, none of the examples involved federal elections conducted pursuant to the Elections Clause at all.

Petitioner says that "[f]rom the earliest days of our country, the people have exercised their right to influence the form of their government." (Pet. Br. 11.) But that unobjectionable statement is wholly unenlightening as to the constitutionality of the Missouri Provision. Of course citizens may communicate their views to their representatives and vote against those who disagree. It does not follow that *States* may require Members of Congress to follow state policies in their legislative activities and then take formal action penalizing those who do not. *Cf. AFL-CIO v. March Fong Eu*, 686 P.2d 609 (Cal. 1984) (finding unconstitutional a state initiative that required state legislators to petition for a constitutional convention on pain of losing their pay); *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829 (Mont. 1984) (finding unconstitutional an initiative that would have required state legislators to petition Congress for a balanced budget amendment under threat of confinement in session and no pay).

The question in this case is whether a State may use its Elections Clause power over the ballot to brand candidates for federal office for disagreeing with the State's official policy on matters of federal law. Petitioner's and her *amici*'s examples do not help to answer this question. None of the examples, from any time period, involved instructions given, received, or interpreted in conjunction with a federal election. Accordingly, they do not implicate the State's power under the Elections Clause. Most of the pre-twentieth century examples of instruction do not centrally involve state enforcement at all. The twentieth century examples, some of which do involve state-sponsored pledges and ballot notations in elections, deal only with state elections, not the Elections Clause, nor the relationship between Members of Congress and their constituents.

Pre-twentieth century examples. None of the pre-twentieth century examples of constituent instructions involved any form of government enforcement.[14] Representatives who flouted the wishes of their constituents had only the wrath of the voters to fear. As Petitioner concedes, any coercive effect of such instructions was a product of the political culture of the time; representatives who disagreed with constituent instructions generally felt compelled either to obey anyway or to resign. (*See* Pet. Br. 14 n.13); *see also* Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 191 (1969). Kobach also concedes that "no formal legal mechanism compelled the representative to obey his instructions" in the colonial era. (Kobach Br. 5.)

But the constitutional question is whether the State can use its powers to conduct federal elections to inject its own view into the voters' choice of Members of Congress. The answer is no: "It was the genius of [the Framers'] idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" and that each layer of government would have "its own direct relationship, its own privity, its own set of mutual rights and obligation to the people who sustain it and are governed by it." *Thornton*, 514 U.S. at 838-39 (Kennedy, J., concurring). When citizens vote for their federal legislators, "they act in a federal capacity and exercise a federal right," protected from State interference. *Id.* at 842 (Kennedy, J., concurring). The Missouri Provision interferes with the "direct link" that the

[14] *See* Pet. Br. 11-14 (recounting instructions issued to delegates to the Second Continental Congress who crafted the Declaration of Independence; to the Framers of the Constitution; and to Members of the First Congress regarding the Bill of Rights); Kobach Br. 4-19 (discussing instructions to delegates to the First and Second Continental Congresses; to state delegates who were framing state constitutions; to States' delegates to the Congress of the Articles of Confederation; to delegates to the Constitutional Convention; to delegates to state ratifying conventions; and to Members of Congress from state ratifying conventions in order to secure the Bill of Rights).

Constitution created between the people and their national representatives by forcing citizens to view the candidate, at the very moment of voting, through a State-imposed lens. *Id.* at 803 (citing *FERC v. Mississippi*, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part)).

Petitioner's and her *amici*'s heavy reliance on *pre*-Constitutional examples of constituent instructions also ignores the establishment of a "National Government [in which] representatives owe primary allegiance not to the people of a State, but to the people of the Nation." *Thornton*, 514 U.S. at 803. Making national representatives accountable to the State was perhaps not inconsistent with the Articles of Confederation, where national legislators were charged with representing "'the *States*, not the *people* of the States,'" *FERC v. Mississippi*, 456 U.S. at 791 (O'Connor, J., concurring in the judgment in part and dissenting in part) (quoting 1 *The Records of the Federal Convention of 1787*, at 133 (M. Farrand ed. 1911)), and the State retained the right to "recall its delegates . . . at any time" and "send others in their stead," Art. of Conf., art. V. But the Framers rejected this system in adopting the Constitution. They jettisoned State recall power over federal legislators precisely because they intended federal elections themselves to be the means for holding federal representatives accountable to their constituents. *See Thornton*, 514 U.S. at 810 n.20; *id* at 889-90 (Thomas, J., dissenting); *see also* 2 Elliot's Debates 320 (Alexander Hamilton) ("Is [a Senator] simply the agent of the State? No. He is an agent for the Union and he is bound to perform services necessary to the good of the whole. . . .").

Twentieth century examples. The twentieth century examples of measures attempting to bind legislators are no more persuasive.[15] Around the turn of the last century, sup-

[15] *See* Pet. Br. 14-17 (discussing pledges taken by state legislators to spur passage of the Seventeenth and Twenty-First Amendments); Kobach Br. 17-19 (discussing instructions to delegates to state conventions re-

porters of the direct election of United States Senators successfully pressed several states to alter the elections process for *state* legislators in order to ensure the election of state legislators who would, in turn, choose Senators who favored adoption of what became the Seventeenth Amendment. *See* 1 George H. Haynes, *The Senate of the United States: Its History and Practice* 100-04 (1938) (describing the systems in Oregon, Nebraska, and North Dakota). Oregon, for example, conducted non-binding popular elections in which voters could express their preference for United States Senator, and permitted candidates for state legislative office to adopt a pledge (or not) either to vote for the people's choice for Senator or to "consider" the people's choice; these candidates could also compose a one hundred word statement to file with their nominating petitions and a twelve word statement to appear next to their names on the ballot. *See id.* at 100-01. Nebraska added a step by providing for a ballot notation for candidates who chose either of the two pledges and no notation for candidates who chose not to adopt a pledge at all. *See id.* at 103. Other states, including Idaho and North Dakota, also adopted similar provisions.

Although these early twentieth century measures involved States printing ballot notations (or other election-related statements), any similarity to the Missouri Provision ends there. Most notably, none of these measures provided for State involvement in federal elections, and thus none raised any question under the Elections Clause.[16] But other

garding adoption of the Twenty-First Amendment); Mo. Term Limits Br. 14-21 (discussing pledges and ballot notations for state legislators designed to spur passage of the Seventeenth Amendment and instructions and pledges for delegates to state conventions considering ratification of the Twenty-First Amendment); Neb. Br. 15-20 (same).

[16] The measures States adopted to press for repeal of the Eighteenth Amendment and ratification of the Twenty-First Amendment also did not apply to elections for federal office. The measure that the Alabama Supreme Court determined was constitutional in *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933), for example, required candidates for delegate to a *state* convention to pledge to follow the popular sentiment expressed in a referendum on the repeal of Prohibition. This provision involved purely internal state processes and did not intrude into the relationship between the federal representative and his constituents.

distinctions abound. Under Nebraska's early twentieth century measure, a candidate could avoid a ballot notation altogether by choosing not to adopt either pledge, while under the Missouri Provision a disobedient candidate cannot escape the State's punishment on the ballot.[17] *See* 1909 Neb. Laws, ch. 51, § 2, at 253. The Oregon provision did not include State-approved ballot language at all; the candidate himself crafted the twelve-word statement that could appear on the ballot. *See* 1 Haynes, *supra*, at 101. Contrary to Petitioner's assertion that Oregon "required" candidates to sign one of the two offered pledges, neither Nebraska nor Oregon made mandatory the adoption of a pledge on the nominating petition. *See id.* at 101-03. In fact, when North Dakota did require candidates to pledge to vote for the people's choice for Senator, the North Dakota Supreme Court struck down that portion of the law as unconstitutional. *See State ex rel. McCue v. Blaisdell*, 118 N.W. 141 (N.D. 1908). The real "teeth" to the Oregon system lay not in the law but in "effective popular agitation." 1 Haynes, *supra*, at 102. Like Odysseus binding himself to the mast to resist the song of the Sirens, the voters of Oregon circulated petitions among themselves, pledging not to sign a petition or vote for the nomination of any candidate who did not promise to vote for the people's choice for Senator.

Finally, the existence of these examples of course does not speak to their constitutionality. "One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States." *Thornton*, 514 U.S. at 823.

[17] Similarly, an Idaho law provided for pledge notation on the ballot only if the candidate promised to *support* the people's choice for Senator. *See* Idaho Session Law, House Bill No. 16, § 41 (1909). The law did not impose a mark of shame for choosing not to precommit (or not to reveal one's choice at all).

B. Petitioner and Her *Amici* Ignore the Consistent Opposition to Instructing Representatives and Misconstrue the Framers' Rejection of a Constitutional Right to Instruct.

Petitioner's and her *amici*'s tale of legislative instruction in America omits an important chapter: the longstanding, principled opposition to constituent instructions. Contrary to their portrayal of constituent instructions as an integral aspect of American representative government, the Framers consciously chose, after a "long debate" on the merits of the practice, not to include a right to instruct representatives in the First Amendment's catalog of political rights that they deemed essential to the operation of the new representative government. *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 162 (Neil H. Cogan ed., 1997).

Before the adoption of the Constitution, there was no consensus about the desirability of instructions, either to state or national legislators. In fact, when the Framers debated adding to the First Amendment a right to instruct representatives, Representative Hartley of Pennsylvania observed that Americans "differed exceedingly" about instruction. 1 *Annals of Cong.* 761 (Joseph E. Gales ed., 1789). Opponents of binding instructions often framed their opposition in terms of foundational principles of representation. They explained that although the people were the source of all political power, they could only exercise that power through the medium of periodic elections, not by continuously instructing their representatives. *See, e.g.*, Wood, *supra*, at 370-71 (describing Judge Alexander Hanson's argument against instructions to state legislators in Maryland in the late eighteenth century). In the post-Revolutionary War period, "Americans in almost all the states mounted increasing attacks on the tendencies of the American representational system, [including] excessive localism, [and] binding instructions . . . . The ideal of an independent and deliberative legislature, attending to the common interests of the whole state, would not die." *Id.* at 195-96.

Prominent political thinkers, including Alexander Hamilton, embraced this ideal. *See* The Federalist No. 71 ("When . . . the interests of the people are at variance with their inclinations, it is the duty of the person whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection."). Our first President was among those who "stood for the independence of the representative" from binding instructions. Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* 462 (1930). George Washington was not "'friendly to positive instructions from electors'" because he believed that representatives "'should be left to act according to the judgment [they] shall form, after being enlightened by the arguments and collected wisdom of a deliberative assembly.'" *Id.* (quoting 1 *Life of Washington, Writings of Washington*, 491). Contrary to the suggestion that "[James] Madison plainly regarded constituent instructions as an intrinsic part of Congress's operations," (Kobach Br. 9), Madison staunchly opposed instructions as incompatible with the essence of representation. He lauded representative government for its ability to:

> refine and enlarge the public views, by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

The Federalist No. 10.[18] Binding instructions undermine the function of the representative, as understood by Madison, by

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[18] In the last footnote of his brief, Kobach attempts to co-opt this oft-quoted language of Madison to buttress the ballot-label law. First, Ko-

preventing him from "refin[ing] and enlarg[ing] the public views" because the citizens have issued inflexible edicts. Noah Webster summarized the problem of instructions succinctly: "They make the opinions of a small part of the state a rule for the whole — they imply a decision of a question, before it is heard — they reduce a Representative to a mere machine, by restraining the exercise of his reason — they subvert the very principles of republican government." Noah Webster, *Government. The Practice of Instructing Representatives Absurd and Contrary to the True Principles of Liberty* 1 American Magazine 206 (1787-88).

The Framers' and others' opposition to the practice of instruction stemmed not only from political theory, but also from first-hand observation of the "bad consequences" of the practice of binding instruction, which was followed in states under the Articles of Confederation. 1 *Annals of Cong.* at 761 (statement of Rep. Hartley). In their view, constituent instructions caused an unhealthy emphasis on local interests, to the exclusion of more general interests, because state legislators were treated as ambassadors of quasi-independent townships and counties. *See* Wood, *supra*, at 192-96. By 1788, as the state legislatures were passing a flurry of ill-considered laws, *see id.*; *id.* at 368-69, James Madison concluded that "a spirit of locality" permeated state politics such

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bach misconstrues Madison's central meaning; this text is generally understood to be an anti-instruction screed. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1059 (1988) (citing Garry Wills, *Explaining America* 216-30 (1981)); Luce, *supra*, at 456. Second, the operation of the Missouri Provision is inconsistent with this description of representation. The Provision leaves no room for federal representatives to do anything with the "public view" that it encapsulates other than to follow it to the letter; any deviation is rewarded with a pejorative ballot notation. Interpretation is penalized, not encouraged. The Provision recorded a "voice" of the people on Election Day in 1996, and instead of allowing the representatives to listen to, understand, interpret, and then speak in that voice, as Madison exhorted, it permits them only to play the recording in the Capitol.

that state legislators were "'everywhere observed to lose sight of the aggregate interests of the Community, and even to sacrifice them to the interests or prejudices of their respective constituents.'"[19] *See* Wood, *supra*, at 195 (quoting Madison's Observations on Jefferson's Draft of a Constitution for Virginia (1788), Julian P. Boyd ed., 6 *The Papers of Thomas Jefferson* 308-09 (1950)). Through binding instructions, the people sapped the ability of state legislators to "refine" their views in light of information gleaned during legislative debate or to compromise in the interest of the public good. In short, the people seemed to be supplanting the legislative function of the state legislatures. *See* Wood, *supra*, at 368. Madison was clearly disturbed by this trend, believing that "the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." *Id.* at 410. In fact, it was not only the inadequate federal structure of the Articles of Confederation, but — perhaps more importantly — the "popular despotism" of the 1780s, *id.* at 411, to which the practice of instruction was integral, that led to the call for a Constitutional Convention. *See id.* at 467 (citing Madison's recognition of this phenomenon).

It is thus no surprise that the Members of the First Congress rejected an attempt by Representative Thomas Tucker of South Carolina to include a "right to instruct" federal representatives alongside the rights of speech, press, assembly, and petition in the First Amendment. 1 *Annals of Cong.* at 761. Petitioner and her *amici* basically ignore the substance of the Representatives' arguments that instructions are incompatible with the principles of republican government en-

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[19] Noah Webster observed that in the post-Independence period, "most of the destructive measures which have been pursued by the states [had] originated in towns and counties, and been carried out by positive instructions from constituents to Representatives." Noah Webster, *Government. The Practice of Instructing Representatives Absurd and Contrary to the True Principles of Liberty* 1 American Magazine 206 (1787-88).

shrined in the Constitution.[20] In fact, the rejection of the "right to instruct" was an acknowledgement that the practice of attempting to bind federal legislators through instructions was incompatible with the conceptions of representation and federalism that underlie the Constitution. *See* Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 25 (1989); Amar, *Philadelphia Revisited*, at 1059-60. The Framers and the Members of the First Congress recognized that the problems faced by the state legislatures in the 1780s would be more severe, both in degree and in kind, in a national legislature. Even John Adams, a staunch defender of the right of state citizens to instruct their *state* representatives, recognized that instruction from States to federal legislators was a different and dangerous idea. Adams wrote that he saw:

> 'no right in our [state] Senate and House to dictate, nor to advise, nor to request our Representatives in Congress. Congress must be 'the cloud by day and the pillar of fire by night' to conduct this nation, and if their eyes are to be diverted by wandring light, accidentally springing up in every direction, we shall never get through the wilderness.'

Luce, *supra*, at 454 (quoting John Adams to J.B. Varnum, Dec. 26, 1808, Works, IX, 605). *See also* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1090 (2000) (noting that the analysis of coercive measures applied to state legislators is "quite different with regard to federal legislators" because "Congress is not an agent of people of the states for any purpose" and "[t]he people of a state cannot displace Congress or preempt it").

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[20] The Brief of the Respondents sets forth this debate in detail, which we will not repeat here.

The context in which the Framers repudiated Representative Tucker's proposal makes it clear that their decision was based on their opposition to instructions, rather than "an acknowledgement of the fact that such clause would be unnecessary," as Kobach asserts. (Kobach Br. 19.) Directly before debating the merits of the "right to instruct" proposal, the House took up a proposal to strike out reference to the right to "assemble" on the grounds that such a right was already logically encompassed by the right to speak. Cogan, *supra*, at 129-31, 143-44. The determination to *retain* the right to assemble refutes Kobach's conclusion that the "right to instruct" was rejected as redundant.

Opponents of the "right to instruct" generally cited two reasons for their opposition: (1) fear that such a right would lead to a predominance of local interests, contravening the national spirit of Congress and the "direct link" between constituents and their federal representatives and (2) concern about stifling legislative deliberation. Several who spoke against the "right to instruct" explained that instruction leads to parochial interests trumping communal interests. *See* 1 *Annals of Cong.* at 761 (statement of Rep. Hartley) ("[C]an it be supposed that the inhabitants of a single district in a State, are better informed with respect to the general interests of the Union, than a select body assembled from every part?"); *id.* at 764 (statement of Rep. Jackson) (fearing that instructions would "drive the house into a number of factions"); *id.* at 767 (statement of Rep. Madison) ("I do not believe the inhabitants of any district can speak the voice of the people; so far from it, their ideas may contradict the sense of the whole people."). Legislators acting under instructions are guided only by the narrower perspective of their electors, rather than the broader sense of the public good. But "Members of Congress are chosen by separate constituencies . . . they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government." *Thornton*,

514 U.S. at 837-38. That is, in essence, why Madison concluded that binding instructions are "of a doubtful, if not of a dangerous nature." 1 *Annals of Cong.* at 767.

Opponents of instruction also recognized that it deters — even renders unnecessary — legislative deliberation. This "displace[ment of] everyday deliberation in ordinary government entities . . . threatens to swallow up Madison's scheme of representative government." Amar, *Philadelphia Revisited* at 1059. The Framers understood that legislators who have no choice but to follow the dictates of their constituents can derive no benefit from the exchange of views and information that a legislative assembly provides. Several Representatives who disapproved of the addition of a "right to instruct" raised the specter of a national legislature that had no function but to tally predetermined votes. *See* 1 *Annals of Cong.* at 763 (statement of Rep. Clymer) (asserting that instruction "is a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the legislatures of free governments"); *id.* at 763-64 (statement of Rep. Sherman) (arguing that instructions give people the false impression that they can "control the debates of the legislature," which would, in turn, "destroy the object of their meeting"); *id.* at 770 (statement of Rep. Livermore) (denying the binding force of instructions because "it might be expedient, nay absolutely necessary, to sacrifice [various measures] in mutual concessions" as part of the lawmaking process). Accordingly, the rejection of the "right to instruct" federal representatives was an affirmation that the Constitution values — indeed, demands — that federal representatives not be bound by instructions that will inevitably eviscerate the national spirit and deliberative character of our Congress.

Given the long and consistent history of strong opposition to the general practice of instructions, as well as the rejection of a constitutional right to instruct by the First Congress, it is not surprising that the practice died out in the mid-nineteenth century. *See* Richard B. Bernstein with Jerome

Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 123 (1993). Petitioner's unsupported assertion that the practice "continued unabated" after the adoption of the Constitution is simply wrong. (Pet. Br. 13.) In addition, the vestigial examples of instructions that remained after the Framing were instructions from state legislatures to the United States Senators they appointed directly, a practice which was mooted by the adoption of the Seventeenth Amendment. *See* 2 George H. Haynes, *The Senate of the United States: Its History and Practice* 1027 (1938). Accordingly, these instructions are irrelevant to the constitutionality of the Missouri Provision.

Moreover, when instructions did crop up after the Framing, their desirability remained contested. For example, in citing the Twelfth Amendment as an example of the use of instructions to attempt to amend the Constitution, (*see* Kobach Br. 17), Kobach neglects to mention that Senators who opposed the practice vehemently criticized it in that instance. *See* Luce, *supra*, at 462-63 (quoting Senator William Plumer, who explained that four or five state legislatures had attempted to bind their federal representatives to favor the amendment but that "'the Legislatures throughout the Union will be told that they must adopt them because Congress, in its wisdom, has seen fit to propose them. We, because they have done it; they, because we have; with no independent action in either case. If such instructions are obligatory, we are mere machines.'"). Similarly, on the hotly debated issue of the re-charter of the Bank of the United States in 1811, Senator Timothy Pickering criticized instructions as incompatible with the Constitution's conception of representation:

> If State Legislatures undertake to dictate, by their instructions, or by requests which are intended to operate equally with instructions, what votes shall be given by their Representatives in Congress, they so far assume the powers vested by the Constitution exclusively in Congress. And if their instructions or

> requests are obeyed, then the State Legislatures, and not Congress, enact laws for the United States.

Luce, *supra*, at 464 (citation omitted in original). Finally, echoing the sentiments of the Framers who had rejected a constitutional right to instruct, Representative Calhoun criticized the practice when it appeared after the adoption of the Constitution: "The ear of this House on this subject, said he, is sealed against truth and reason. What has produced this magic spell? Instructions! Well, then, has it come to this? Have the people of this country snatched the power of deliberation from this body?" 30 *Annals of Cong.* 576 (1817). In light of this steady pattern of opposition, and the Framers' considered decision to reject a constitutional right to instruct, Petitioner's and her *amici*'s smattering of post-Framing and pre-Seventeenth Amendment examples of instructions to Members of Congress do not form any consistent or durable pattern of practice that deserves deference.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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